**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petition of Ameritech Corporation | ) | |
| for Forbearance from Enforcement of | ) | CC Docket No. 98-65 |
| Section 275(a) of the Communications | ) | |
| Act of 1934, As Amended | ) | |

# MEMORANDUM OPINION AND ORDER

**Adopted:** August 11, 1999 **Released:** August 31, 1999

By the Commission: Chairman Kennard issuing a statement; Commissioners Furchtgott-Roth and Powell dissenting and issuing separate statements.

## I. INTRODUCTION

1. On May 13, 1998, Ameritech Corporation (Ameritech) filed a petition requesting that we exercise our authority under section 10 of the Communications Act of 1934, as amended (Communications Act or Act), to forbear from applying the provisions of section 275(a) of the Communications Act to Ameritech's alarm monitoring operations.[1] For the reasons set forth below, we deny Ameritech's petition.

## II. BACKGROUND

### A. Alarm Monitoring

2. Alarm monitoring services rely on devices placed within customer premises to detect possible threats "to life, safety, or property, from burglary, fire, vandalism, bodily

---

[1] In a public notice released May 20, 1998, the Common Carrier Bureau's Policy and Program Planning Division invited comment on Ameritech's petition. *Pleading Cycle Established for Comments on Ameritech's Petition for Forbearance from Enforcement of Section 275(a)*, CC Docket No. 98-65, 13 FCC Rcd 10303 (Policy & Program Planning Div., Com. Car. Bur., 1998). The Alarm Industry Communications Committee (AICC) and AT&T Corp. (AT&T) filed comments opposing the petition, and Ameritech replied. On April 15, 1999, pursuant to section 10(c) of the Communications Act, 47 U.S.C. § 160(c), the Bureau extended until August 11, 1999, the date on which Ameritech's petition for forbearance shall be deemed granted in the absence of a Commission decision that the petition fails to meet the requirements for forbearance in section 10(a) of the Act. *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended*, CC Docket No. 98-65, DA 99-716 (Com. Car. Bur., Apr. 15, 1999).

injury, or other emergency."[2] When triggered, these devices transmit signals via "transmission facilities of a local exchange carrier or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue, security, or public safety personnel of such threat."[3]

3. Congress addressed Bell Operating Company (BOC) provision of alarm monitoring services in section 275 of the Communications Act,[4] which was enacted as part of the Telecommunications Act of 1996 (1996 Act).[5] Section 275(a)(1) prohibits any BOC, that had not been engaged in providing alarm monitoring services as of November 30, 1995, from engaging in the provision of alarm monitoring services "prior to the date which is 5 years after the date of enactment of the [1996 Act] . . . ."[6] Section 275(a)(2) permits any BOC that was engaged in the provision of alarm monitoring services as of November 30, 1995, either directly or through an affiliate, to continue to provide alarm monitoring services.[7] Section 275(a)(2) specifies, however, that neither the BOC nor its affiliates may "acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity" from November 30, 1995 "until 5 years after the date of enactment of the [1996 Act] . . . ."[8]

4. Ameritech began providing alarm monitoring services during 1994. In the *Alarm Monitoring Report and Order*, the Commission determined that section 275(a)(2) grandfathered Ameritech's pre-November 30, 1995 alarm monitoring operations.[9] Since the

---

[2] 47 U.S.C. § 275(e)(1).

[3] 47 U.S.C. § 275(e)(2).

[4] 47 U.S.C. § 275.

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151, *et seq.*

[6] 47 U.S.C. § 275(a)(1); *see* 47 U.S.C. § 275(a)(2). That date is February 8, 2001.

[7] 47 U.S.C. § 275(a)(2).

[8] *Id.*

[9] *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Second Report and Order, CC Docket No. 96-152, 12 FCC Rcd 3824, 3839, ¶ 33 (1997) (*Alarm Monitoring Order*), *recons. pending, aff'd sub nom., BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C.Cir. 1998), *cert. denied*, 119 S.Ct. 1495 (1999).

passage of the 1996 Act on February 8, 1996, Ameritech has expanded its alarm monitoring operations through the following acquisitions:

| ACQUISITION | DATE |
|---|---|
| All Assets of Circuit City Corporation's Home Security Division (Circuit City) | 6/28/96 |
| All Assets of Central Control Alarm Corporation (Central Control) | 4/16/97 |
| All Assets of Norman Systems Securities, Inc., (Norman Systems) | 4/18/97 |
| All Assets of Masada Security, Inc. (Masada Security) | 6/19/97 |
| Six Subsidiaries of Republic Security Companies Holding Co., Inc. (Republic ) | 10/3/97 |
| All Assets of Rollins, Inc. (Rollins) | 10/3/97 |

5. In August 1996, the Alarm Industry Communications Committee (AICC) filed a motion with the Commission alleging that Ameritech's 1996 acquisition concerning Circuit City violated section 275(a)(2). In March 1997, the Commission concluded that section 275(a)(2) did not preclude that transaction.[10] In December 1997, the United States Court of Appeals for the District of Columbia Circuit vacated that judgment and remanded the case to the Commission.[11] In September 1998, the Commission determined on remand that the Circuit City acquisition violated section 275(a)(2) and directed Ameritech to show cause why the Commission should not issue a cease and desist order with regard to that purchase.[12] In July 1998, the Commission issued a similar *Order to Show Cause* in relation to the Central

[10] *Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, against Ameritech Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 3855 (1997), *vacated and remanded sub nom., Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (*AICC v. FCC*).

[11] *AICC v. FCC*, 131 F.3d at 1071.

[12] *Enforcement of Section 275(a)(2) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, against Ameritech Corporation*, Memorandum Opinion and Order on Remand and Order to Show Cause, 13 FCC Rcd 19046, 19056-60, ¶¶ 19-29 (1998) (*Ameritech Circuit City Show Cause Order*).

Control, Norman Systems, and Masada Security acquisitions.[13] In October 1997, AICC requested that we issue an Order to Show Cause directed against Ameritech's Republic acquisition.[14]

### B. Section 10

6. Section 10 of the Communications Act authorizes the Commission to forbear from applying any provision of the Act to a telecommunications carrier, if the Commission determines that --

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[15]

In making the public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[16] Section 10(b) also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[17]

---

[13] *Enforcement of Section 275(a)(2) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, against Ameritech Corporation*, Memorandum Opinion and Order and Order to Show Cause, 13 FCC Rcd 15053, 15067-72, ¶¶ 24-32 (1998) (*Ameritech Central Control Show Cause Order*).

[14] *See Pleading Cycle Established for Comments on Alarm Monitoring Communications Committee Fourth Emergency Motion for Orders to Show Cause and To Cease and Desist*, Public Notice, 12 FCC Rcd 16428 (Policy & Program Planning Div., Com. Car. Bur., 1997).

[15] 47 U.S.C. § 160(a).

[16] 47 U.S.C. § 160(b).

[17] *Id.*

## III. DISCUSSION

7. As noted above, section 10(a) authorizes the Commission to forbear from applying a provision of the Act only if all three of the criteria of section 10(a) are met. These criteria include a finding that such forbearance is consistent with the public interest. In the *CMRS Forbearance Order*,[18] the Commission determined that in order to meet the public interest forbearance criterion, a petitioner must explain how the benefits of a statutory provision can be attained in the event of forbearance. AICC and AT&T argue that Ameritech does not satisfy this criterion.[19] We agree.

8. In enacting section 275(a), Congress made a policy judgment that the restrictions on Ameritech's alarm monitoring operations should sunset on February 8, 2001. Ameritech's petition is, in effect, a request that we adopt an earlier sunset date. Ameritech, however, does not contend that any changed or unanticipated circumstance warrants an earlier sunset. Instead, Ameritech recognizes that section 275 represents a legislative compromise,[20] and essentially asks us to reopen and upset that compromise based on arguments Congress found unpersuasive in 1996.[21]

9. In these circumstances, we find that forbearance is not in the public interest. Given Ameritech's failure to present any new or unanticipated circumstance that might have persuaded Congress to adopt an earlier sunset date, it would be inconsistent with the public interest for us to shorten the period during which Ameritech participation in alarm monitoring should be restricted or otherwise upset Congress' judgment on how to promote competitive conditions in the alarm monitoring market.

10. Accordingly, the public interest criterion for granting forbearance under section 10(a) has not been met on the record in this proceeding. Because section 10(a) provides for forbearance only when all three of its criteria are met, we thus find it unnecessary to address whether Ameritech's petition meets the other criteria.

---

[18] *Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-61, Memorandum Opinion and Order, 14 FCC Rcd 391, 405, ¶ 31 (1998) (*CMRS Forbearance Order*).

[19] AICC Comments at 19; AT&T Comments at 7.

[20] Ameritech Petition at 5; *see also* AICC Comments at 5. We note that the House bill would have restricted entry for four years from that date, while the Senate bill would have restricted entry for six years from the date of enactment. Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 156-57 (1996) (*Joint Explanatory Statement*).

[21] Ameritech Petition at 3-5, 10-27; *see also* AICC Comments at 1-2; AT&T Comments at 5.

11. On the basis of the foregoing, we conclude that Ameritech's petition for forbearance from the application of section 275(a) to Ameritech's alarm monitoring operations does not meet the statutory criteria for forbearance. We therefore deny that petition.

## IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, that Ameritech's Petition for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

## SEPARATE STATEMENT OF CHAIRMAN KENNARD

The Commission's authority under section 10 of the Act is an important deregulatory tool. I am strongly committed to exercising this authority whenever the statutory standard is met. Because Ameritech has not met the statutory standard, we are not permitted under the Communications Act to forbear here.

AICC has argued that forbearing in this situation would render section 10 an unlawful delegation of legislative authority by Congress. The Commission need not reach this issue because Ameritech did not meet the statutory standard for forbearance. I want to take this opportunity to express my view that section 10 is a constitutional exercise of congressional authority. In any event, this particular forbearance petition involves an unusual situation where there has been no showing of any change in circumstances that would undercut the congressional rationale for this recently enacted, targeted statutory provision with an explicit short-term expiration date. It is highly unlikely that such situations will arise in the future. Thus, I do not anticipate that there will be any future substantial issues of unlawful delegation by Congress with respect to section 10.

I also take this opportunity, in response to my colleague, to note that the Common Carrier Bureau had clear authority to extend the time period for action on Ameritech's petition. Commission rules recognize that the authority of the Bureau to carry out "the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to [the] Commission under Sec. 0.291." Sec. 0.291 does not reserve to the Commission the authority to grant extensions of time and hence that authority is within the purview of the Bureau. My colleague suggests that the decision as to whether to extend a time period presents "novel questions of fact, law or policy which cannot be resolved [by the Bureau] under outstanding precedents and guidelines." Yet time extensions are anything but novel. In a wide variety of contexts the Common Carrier Bureau has extended time periods, as well as denied extension requests, as appropriate, and has never, to my knowledge, been reversed by the Commission. The Bureau thus has always exercised its authority in a lawful and appropriate manner, as it did here. Unless and until the Commission acts to reverse such Bureau action, it is the law. 47 U.S.C. Sec. 5(c)(3).

# DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

*Re: Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended.*

I respectfully dissent from this item denying Ameritech's Petition for Forbearance from section 275(a) of the Communications Act of 1934, as amended.

I conclude that Ameritech's petition has been "deemed granted" in full because of the Commission's failure either (i) to deny the petition within one year after receiving it, or (ii) to make an explicit finding that a 90 day extension was necessary to meet the statutory requirements. Section 10 of the Communications Act is very clear: "The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)." The statute is thus specific that it is the "Commission" that must grant any extension and that it must do so upon a finding that the extension is necessary to meet the purposes of section 10(a). I do not believe that the Bureau, acting on its own motion and without even prior consultation with the "Commission," can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the Bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

The Commission's own rules demonstrate that the Common Carrier Bureau may not act on delegated authority to extend the statutory deadline. Specifically, Section 0.91(f) of the Rules permits the Bureau to "[carry] out the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to [the] Commission under Sec. 0.291." Section 0.291(2) states that the Bureau shall not have authority to act on issues "which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." The Commission has not established criteria for determining when and if the extension specifically permitted by statute in Section 10 of the Communications Act is warranted.[1] Thus, the question of whether an extension is necessary is a novel question of fact, law or policy that may not be resolved under existing Commission precedent, and therefore, may not be answered on delegated authority. Indeed, the only criterion which the Bureau seems to follow is that they will routinely grant Section 10 extensions. Clearly, section 10 does not contemplate a routine extension.

---

[1] Although the Commission has acted to extend the section 10 deadline without establishing criteria for its decision, one cannot infer from this action that the statutory basis for this extension identified in section 10 is meaningless, and that the Bureau may extend the deadline without even consulting the Commission.

# SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, DISSENTING

*In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) if the Communications Act, as Amended, CC Docket No. 98-65, Memorandum Opinion and Order.*

There are quite a few problems with this Order, both in terms of what it says and what it does not say. For starters, the Order misinterprets and misapplies section 10's public interest prong by shifting an unsubstantiated burden to the petitioner and applying the wrong standard. Specifically, the item says that in order to meet this forbearance criterion (section 10(a)(3)), a petitioner must explain how the benefits of a statutory provision can be attained in the event of forbearance.[1] As I have asserted in prior statements, the language of section 10 places on the FCC a greater burden to demonstrate that all three prongs of the forbearance test are or are not satisfied, whether it be a rule or a statutory provision.[2] The majority apparently now believes that it can summarily dismiss forbearance petitions, with mere passing reference to only one of the congressionally mandated prongs of analysis. It makes no effort to explain the benefits of section 275(a). Instead, the majority ignores the public interest benefits of forbearance asserted by Ameritech, fails to balance them against the purpose of section 275(a) and invents a new public interest principle.[3]

This new principle, suggested by the alarm industry, would recognize that we are dealing with an act of Congress passed a relatively short time ago (1996) which sunsets a little more than a year from now. It would require that Ameritech show that there are "new or unanticipated circumstance[s] that might have persuaded Congress to adopt an earlier sunset."[4] Yet, nothing in

---

[1] *See Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-61, Memorandum Opinion and Order, 14 FCC Rcd 391 (1998). The item fails to note that, even if this is the burden placed on proponents of forbearance, this principle was established in a Commission Order released more than seven months after Ameritech filed its petition. Ameritech would not have had a clue that this is what its petition needed to show. The item also fails to note that the Order is subject to judicial appeal and petitions for reconsideration.

[2] *See Memorandum Opinion and Order and Notice of Proposed Rulemaking*, Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition For Forbearance For Broadband Personal Communications Services, 13 FCC Rcd 16857 (1998) (Statement of Commissioner Powell, dissenting in part).

[3] Nor does the item really address what the intended benefits of the alarm monitoring prohibition were. I will address this below. I note further that the item makes no attempt whatsoever to carry out the mandate of section 10(b) considering whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.

[4] *See* Order at ¶ 9; *see also* Comments of the Alarm Industry Communications Committee (AICC) at 5-8. A concern about the short time left in the life of this statutory provision also would have led me to question why we

the text or legislative history of section 10 requires or suggests "changed circumstances" as a prerequisite to forbearance of a statutory provision. Nor has the Commission ever employed this standard for denying forbearance and the item cites none. So, where does this new standard come from?

**Apparent Constitutional Concerns Are Not A Basis For Failing To Follow Congressional Direction.**

AICC argues that failure to read in a requirement that circumstances must be shown to have changed before forbearing from a statutory provision would constitute an unconstitutional delegation of authority to the FCC. Perhaps out of this concern – and I can only surmise since it is not addressed – the Order summarily dismisses the petition to forbear from a statutory provision, stating flatly that nothing has changed since its adoption. I, too, find something disquieting about Congress delegating broad authority to an independent agency to sweep away a legislative act, particularly where little has changed since the time the legislative act was consummated. But, my discomfort is no greater than that I feel with respect to the extraordinarily broad authority we regularly invoke to promulgate rules or expand regulatory coverage beyond the express terms of statutes. Moreover, regardless of our constitutional concerns with the statute, we are duty bound to comply with clear congressional directives. [5]

Based on my brief review of precedent in this area, I believe that it is quite questionable that a court would find section 10 to be an unconstitutional delegation of authority, or otherwise contravene the separation of powers, under the long line of applicable judicial precedent. In order to avoid a delegation infirmity, Congress need only set out an "intelligible principle to which the person or body authorized [to act] is directed to conform. . ."[6] With respect to section

---

would grant such relief if it was coming relatively soon through operation of the sunset. However, I must point out that when Ameritech filed its petition, May 13, 1998, it was less than half-way through the life of section 275(a). A year plus 90 days later we are telling Ameritech to wait it out until February 2001. This remaining time period in a highly competitive industry like alarm monitoring is an eternity to companies seeking to grow their business and provide their public shareholders sustained value in a volatile market.

[5] *See cf.* Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, §21(a) 93 Stat. 1049 (requiring Attorney General to report to each House of Congress a determination that the Department of Justice "will refrain from defending any provision of law enacted by Congress . . . because of the position of the Department that such provision is not constitutional"). Congress appears to have been clear that it generally expects the constitutionality of its laws to be defended, such that it may require notification from agencies if they do not intend to meet this expectation.

[6] *J.W.Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). But for a recent case in the D.C. Circuit released after AICC filed its comments (*see American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999)), the courts have generally avoided striking down acts of Congress or their implementation by administrative agencies under the non-delegation doctrine. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (there is "a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *see also id.* at 416 (Scalia, J. dissenting and noting that the Supreme Court has "almost never felt qualified to

10, Congress has provided a three-prong analysis to guide our forbearance decisions. And with respect to the final "public interest" finding, Congress has offered specific guidance as to the things that "shall" be taken into consideration. Specifically, Congress commands the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. § 160(b). If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

In my attempt here to defend section 10 from this constitutional attack by AICC, which the majority does not do, I cannot resist making the observation that if section 10 is constitutionally suspect on this basis, many of the other standards presently applied to justify our regulatory actions are as well. For example, the "public interest, convenience and necessity" standard is unbounded yet has been upheld against constitutional attack. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). The Commission has also reached for "ancillary jurisdiction" or other broad "necessary and proper" delegations as a basis for regulating the cable industry and, more recently, asserted such plenary power in an unconstrained manner to extend coverage of

---

second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.") In fact, the Court has held in only two cases that a statue amounted to an unconstitutional delegation of legislative authority, and this was over fifty years ago. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding that a provision of the National Industrial Recovery Act was an unconstitutional delegation because it allowed the President to exercise unfettered discretion to determine policy as to the transportation of excess oil; the statute failed to articulate a proper standard to govern the President's actions).

In the other case from 1935, which AICC cites, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court held that another provision of the National Industrial Recovery Act was unconstitutional because it once again provided the President with the ability to legislate without proper congressional guidance or an "intelligible principle." In *Schechter*, the President approved codes of fair competition that were developed by the industry. Congress had no part in the development of these codes, which had the force of law. The Court faulted this code-making process for creating a private delegation where an industry was, in essence, making law. I read *Schechter* as generally standing for the proposition that Congress may not delegate unfettered lawmaking authority to private parties, which section 10 of the Communications Act surely does not do.

AICC also cites *Loving v. United States*, 517 U.S. 748 (1996), which repeats the general rule that Congress must also "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 771 (quoting *J.W. Hampton*, 276 U.S. at 409). The Court in *Loving* said that "the intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes. *Id.* (citation omitted); *see also* AICC comments at n.4. However, in that case cited by AICC, the Court upheld the alleged delegation under the intelligible-principle rule, noting further that, since 1935, it has upheld, without exception, delegations under standards phrased in "sweeping terms." *Id.* (citing *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity")).

section 255 to non-telecommunications services and the 1996 Act to private building owners and managers. I personally have never fully agreed with the courts' apparent sanctioning of such broad grants, but such decisions are the law. *See, e.g., Texas Office of Public Utility Counsel v. FCC*, 1999 WL 556461 (5th Cir. 1999) (holding that section 4(i) of the Act permits support of non- telecommunications carriers providing internet access and internal connections to schools and libraries as "necessary to fulfill [the Act's] primary directives.")

I am disturbed to note, however, that broad grants of authority to impose new regulations often proceed with little hesitation, but in the application of a broad grant to deregulate like section 10, we suddenly (apparently) give in to a concern about unconstitutional delegations of authority. Moreover, I disagree that the Commission can ignore a congressional directive because a party has argued that such directive might be unconstitutional. Nor do I believe it is free to import additional criterion, which are not necessary to cure any potential constitutional infirmity. But, ironically, this Order short shrifts the congressionally crafted "intelligible principles" in section 10. That is, arguably the allegiant application of the three-prong test set out in section 10 is essential in order not to usurp unconstrained legislative power which might give rise to separation of power concerns.

Yet, here (as we have done before over my objections), the item summarily dismisses a properly presented and well-supported forbearance petition, resting exclusively on only one of the three guiding principles set out by Congress – as applied the apparently broad, catch-all public interest prong. More disturbingly, as noted above, the application of that prong in this case fails to take into account the specific direction to consider the promotion of competition when evaluating this basis of decision. Rather, the item perpetuates an open-ended notion of "public interest," to import (at the eleventh hour) new and novel additional requirements.

**"Changed Circumstances."**

There is no attempt to even find "changed circumstances" or apply this new test in this Order. Even if "changed circumstances" were relevant, can we not point to the circumstances facing Ameritech and SBC in their merger (in which the alarm industry is requesting that we require divestiture of all of Ameritech's alarm monitoring assets because SBC is not grandfathered)? Can we not rely on the implementation on our non-structural safeguards or the other safeguards that apply to other LECs in section 275? Can not we point to the fact that the Commission's own interpretation of section 275, after a loss in the D.C. Circuit, has changed, essentially putting a halt to any expansion by Ameritech's alarm monitoring affiliate? No, the burden is shifted to Ameritech.

**Sections 10 and 275(a) Can Coexist.**

By its terms, section 10 unequivocally can be applied to section 275. Forbearance must be applied to both Commission regulations and to provisions of the Communications Act, including those added by the 1996 Act. Indeed, the statute itself in section 10(d) lists the

provisions for which forbearance is not available (excluding section 275): "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission has already forborne from section 272 of the 1996 Act in connection with RBOC provision of E-911[7] and reverse directory services.[8] Even where the Commission refused to forbear from section 254(g), it never mentioned that forbearance would be impossible in view of the simultaneous enactment of that provision and section 10.

I would agree that many of the points that argue for forbearance (some of which I set forth below) were probably the case at the time section 275 was adopted. True enough, but one answer is simply because at the same time 275 was adopted, so was section 10 and we are duty-bound to apply it, without regard to alleged constitutional concerns. A second answer, however, is that Congress set out a comprehensive scheme in the 1996 Act which required many complex judgments that it did not believe it could responsibly make without thorough analysis. Also, there are a lot of deals and compromises that get into large pieces of legislation like this. Consequently, Congress concurrently established certain bars or limitations as starting points and delegated to the Commission the job of carefully evaluating such provisions to see if less regulatory devices existed to render unnecessary blanket bans against certain activity. Indeed, the advantage of forbearance is that it requires case-by-case evaluation, where a flat rule has dangers of being over-inclusive. Congress may have wished to establish a default presumption that barred entry, which could be rebutted through forbearance in a certain case.

It is also important to observe that Congress understood that it could not possibly sort through the panoply of FCC regulations and antitrust doctrine that might assuage some of its

---

[7] *See Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627 (1998). In the Order, the Common Carrier Bureau granted the petitions of BellSouth and other Bell Operating Companies, pursuant to section 10 of the Communications Act, for forbearance from the application of the separate affiliate requirements of section 272 to their E911 services and to BellSouth's reverse search directory assistance services.

[8] *See Nevada Bell, Pacific Bell and Southwestern Bell Telephone Company Petition for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Reverse Search Services*, CC Docket No. 98-193, Memorandum Opinion and Order, 1999 WL 198878 (Apr. 9, 1999). In the Order, the Common Carrier Bureau granted the petitions of Nevada Bell, Pacific Bell, and Southwestern Bell Telephone Companies for forbearance from the application of section 272 of the Communications Act of 1934, as amended, to their electronic reverse directory services.

concerns with respect to competition. Instead, it may have chosen to direct the FCC to make such an assessment and if convinced, following its "intelligible principle," that if the provision was unnecessary, it could forbear. Therefore, in concluding that there must be a peaceful coexistence of sections 10 and 275(a), the original intent of section 275 must be fairly assessed.

**Understanding Section 275(A) And Applying Section 10 To It.**

The text of section 275(a) does not help explain why the RBOCs are banned from the alarm monitoring business for five years. The conference report and most floor statements, while attempting to explain the scope of the grandfathering provision that applies to Ameritech, does not discuss why the growth of Ameritech's alarm business is restricted in certain ways. *See* S. Conf. Rep. 230, 104th Cong., 2nd Sess. 348-50 (1996); *see also Alarm Industry Communications Comm. v. FCC*, 131 F.3d 1066, 1071 (D.C. Cir. 1997). However, when you go back a little further to try to figure out how Congress was going to handle things that grew out of the line of business restrictions originally imposed by the MFJ, you discover two principal concerns: (1) concern that the incumbent could leverage its control over the "local bottleneck" telephone infrastructure to gain a competitive advantage in providing alarm monitoring services; and (2) concern by the "small business dominated alarm industry" that big companies like the RBOCs will harm competition and upset the "level playing field." *See* H.R. Rep. No. 204(i), 104th Cong., 1st Sess. 237-38 (1995); *see also* 141 Cong. Rec. S8355-56 (June 14, 1995) (statement by Senator Harkin).

Then, when one faithfully applies the prongs of section 10, it is difficult to conclude that section 275(a)(1) is necessary to ensure just and reasonable, nondiscriminatory rates, or (2) is necessary to protect consumers from harm, or (3) that it is inconsistent with the public interest to forebear, unless we want to, with full disclosure, continue the "public interest," as Senator Harkin saw it, in protecting this competitive "small business" industry. We must also ask ourselves whether there are other alternatives that could shape the implementation of section 275(a) in a way that best matches competitive and regulatory realities of the day. For example, we should have explored relief for Ameritech that is prospective only so that any alleged section 275 violations could be adjudicated and proper sanctions could be imposed for such violations (if found). Also, we should have explored out-of-region relief, which would address the Congress' and the alarm industry's concerns about bottleneck facilities. This approach would also show that section 10 does in fact contain limiting principles and can be applied in a way to avoid alleged unconstitutional delegation problems.

If we had conducted a proper section 10 analysis, I think it might have proved sufficiently persuasive to grant, at least in part, the petition. Perhaps the majority would not have so found. But they must, I believe, reach that conclusion only after a full and faithful application of the standards set forth by Congress, which they have failed to do here. Moreover, I am disheartened by the degree to which we express reluctance to employ broad grants for deregulatory purposes, but express little concern when such grants are invoked for adoption or extension of new rules. For these reasons, I respectfully dissent.